RECENT DEVELOPMENTS

OHIO'S NEW ONE-CAUSE-OF-ACTION RULE FOR NEGLIGENT ACTS

Rush v. Maple Heights, 167 Ohio St. 221, 147 N.E.2d 599 (1958)

Plaintiff recovered a judgment in the Municipal Court of Cleveland in the amount of one hundred dollars for property damages to her motorcycle caused by the negligence of the defendant in failing to keep a portion of one of its streets in good repair. The plaintiff then commenced a second action against the same defendant in common pleas court for personal injuries arising out of the same incident. The jury returned a verdict for the plaintiff in the amount of $12,000 and a judgment was rendered in her favor for the full amount. On appeal the Ohio Supreme Court reversed 6-1, holding only one cause of action arises from a single tort of negligence even if this wrongful act resulted in both damage to property and injury to the person.[1] In reversing the lower court, the Supreme Court directly overruled paragraph four of the syllabus of *Vasu v. Kohlers*,[2] a unanimous decision rendered by the court in 1945.

When a wrongful or negligent act causes both property damages and injuries to a person the question arises as to whether there are two causes of action or only one, and the authorities are in conflict. The rule followed in the majority of states[3] is that only one cause of action

[1] 167 Ohio St. 221, 147 N.E. 2d 599 (1958).

[2] 145 Ohio St. 321, 61 N.E. 2d 707 (1945). See Note, 24 CHI-KENT. L. REV. 183 (1946).

[3] Birmingham Southern Ry. v. Lintner, 141 Ala. 420, 38 So. 363 (1904); Jenkins v. Skelton, 21 Ariz. 663, 192 Pac. 249 (1920); Gregory v. Schnurstein, 212 Ga. 497, 93 S.E.2d 680 (1956); Georgia Ry. & Power Co. v. Endsley, 167 Ga. 439, 145 S.E. 851 (1928); Fiscus v. Kansas City Public Service Co., 153 Kan. 493, 112 P.2d 83 (1941); Cassidy v. Berkovitz, 169 Ky. 785, 185 S.W. 129 (1916); Pillsburg v. Kesslen Shoe Co., 136 Me. 235, 7 A.2d 898 (1939); Doran v. Cohen, 147 Mass. 342, 17 N.E. 647 (1888); Dearden v. Hey, 304 Mass. 659, 24 N.E.2d 644, 127 A.L.R. 1077 (1939); Tuttle v. Everhot Heater Co., 264 Mich. 60, 249 N.W. 467 (1933); King v. Chicago, Milwaukee & St. Paul Ry., 80 Minn. 83, 82 N.W. 1113 (1900); Kimball v. Louisville & Nashville Rd. Co., 94 Miss. 396, 48 So. 230 (1909); Chamberlain v. Mo-Ark Coach Lines, Inc., 354 Mo. 461, 189 S.W.2d 538, 161 A.L.R. 204 (1945); Underwood v. Dooley, 197 N.C. 100, 147 S.E. 686, 64 A.L.R. 656 (1929); Anderson v. Jacobson, 42 N.D. 87, 172 N.W. 64 (1919); Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 117 Atl. 59 (1922); Farmer's Ins. Exchange v. Arlt, 61 N.W.2d 429 (N.D. 1953); Holcombe v. Garland & Denwiddie, Inc., 162 S.C. 379, 160 S.E. 881 (1931); Mobile and Ohio Rd. Co. v. Matthews, 115 Tenn. 172, 91 S.W. 194 (1906); Smith v. Lenzi, 74 Utah 362, 279 Pac. 893 (1929); Moultroup v. Gorham, 113 Vt. 317, 34 A.2d 96 (1943); Sprague v. Adams, 139 Wash. 510, 247 Pac. 960, 47 A.L.R. 529 (1926); Larzo v. Swift & Co., 129 W. Va. 436, 40 S.E.2d 811 (1946).

accrues, and hence, since a cause of action may not be split,[4] recovery of a judgment for either item of damage may be pleaded as a bar to a second cause of action for recovery upon the other item of damage.[5] These courts base their decisions upon the principle that a cause of action is derived from the negligent act which produced the effect, rather than from the number of rights invaded, relegating the invasion of rights to merely items of damage. This rule is based on a policy of simplicity and expediency,[6] rather than upon any legalistic definition of a "cause of action."

The "two-causes-of-action" rule, (which was the old Ohio rule under *Vasu v. Kohlers*[7]) is still the law in a minority of states.[8] Under this rule a cause of action is derived from the invasion of each legal right. Therefore, when a wrongful act results in the invasion of both property rights and personal rights of a party, two causes of action accrue, and judgment on one cannot be asserted as a bar to any subsequent action upon the other.[9]

In adopting the majority rule, the court in the principal case cited a quotation from *Mobile and Ohio Rd. Co. v. Matthews*,[10] as adequately expressing the legal reasoning for its decision. That case held:

> This (one-cause-of-action rule) is necessary to prevent multiplicity of suits, burdensome expense, and delays to plaintiff, and vexatious litigation against the defendants.

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[4] Judgment on the merits for the plaintiff or the defendant in a suit for one of several items of damage arising out of only one cause of action, extinguishes the entire cause of action and thus precludes a second suit for any of the other items of damage. This is sometimes expressed as splitting a cause of action. Vasu v. Kohlers, *supra* note 2; Cincinnati v. Emerson, 57 Ohio St. 132, 48 N.E. 667 (1897); Cockley v. Brucker, 54 Ohio St. 214, 44 N.E. 590 (1896); CLARK, CODE PLEADING §73 (2d ed. 1947).

[5] For a more thorough discussion of this conflict among the various jurisdictions see 1 AM. JUR., *Actions* §114 (1936).

[6] King v. Chicago, Milwaukee & St. Paul Ry., *supra* note 3, a leading case on the one-cause-of-action rule, held that "the views we have adopted seem to us more in harmony with the tendency towards simplicity and directness in the determination of controversial rights."

[7] *Supra* note 2.

[8] Boyd v. Atlantic Coast Line Ry., 218 Fed. 653 (1914); Schermerhorn v. Los Angeles Pacific Ry., 18 Cal. App. 454, 123 Pac. 351 (1912); Clancy v. McBride, 338 Ill. 35, 169 N.E. 729 (1924); Ochs v. Public Service Ry., 81 N.J. 661, 80 Atl. 495 (1911); Reilly v. Sicilian Asphalt Pacing Co., 170 N.Y. 40, 62 N.E. 772 (1902); Watson v. Texas & Pacific Ry., 8 Tex. Cir. App. 144, 27 S.W. 924 (1894); Carter v. Hinkle, 189 Va. 1, 52 S.E.2d 135 (1949).

[9] Reilly v. Sicilian Asphalt Paving Co., *supra* note 8, held that "if, while injury to the horse and vehicle of a person give rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to the property that makes it impracticable or at least very inconvenient in the administration of justice to blend the two."

[10] *Supra* note 3.

As a consequence of the decision in the principal case it becomes apparent that where there is no subrogation involved a plaintiff must now ask for compensation for both property damage and personal injury in the same action or be subject to merger or bar.[11] But the effect of this new ruling on subrogated or assigned claims still remains unanswered. To exemplify this problem let us assume that A takes out a "$50 Deductible Collision Policy" with the B Insurance Company. Under the terms of the policy the company agrees to pay A the full amount of property damages he may sustain on his motor vehicle less $50, provided A assigns or subrogates any claims which A may have for damage done to his motor vehicle. Now suppose that A and X are involved in an accident in which A suffers $500 damage to his automobile and also extensive personal injuries. Under the terms of his policy B Company pays A $450 in return for which A subrogates to the B Company his claim against X for property damages.[12] If the B Company then files an action against X to recover the money it had advanced to A and judgment was rendered on the merits, would this judgment constitute a bar to a future suit by A for recovery on his personal injury claim?

Under the minority approach the above illustration presents no problem because the insured has only assigned *one* of his *two* causes of action to the insurer. Under the majority approach, however, the insured has only *one* cause of action, and an assignment of part of that cause of action and a subsequent suit thereon by the assignee could be said to amount to a splitting of a cause of action, and consequently a bar to any subsequent suit by the insured. Most one-cause-of-action jurisdictions have recognized an exception to the one-cause-of-action approach when a subrogation claim is involved,[13] treating these particular cases in the same manner in which they would be treated under the minority, or two-cause-of-action rule. Those jurisdictions within the majority bloc refusing to recognize this exception require the insured and the

[11] When judgment for the plaintiff is had on one item of damage of a cause of action, the whole cause of action is said to *merge* in the judgment and any subsequent suit must be brought on the judgment and not on the original cause of action. When a judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause. The judgment is said to act as a *bar* to any subsequent action. See RESTATEMENT, JUDGMENTS §§48, 49 (1942).

[12] Despite the fact that the insurer gave $450 to A, he is still assigned the whole claim. Ohio Farmers Ins. Co. v. McNeil, 103 Ohio App. 279, 143 N.E.2d 727 (1926). Then, if the company recovers $500 from X, it will give A back the $50 he had to expend under the policy.

[13] Travelers Indemnity Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947); Underwriters at Lloyds Ins. Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913); General Exchange Ins. Corp. v. Young, 357 Mo. 1099, 212 S.W. 2d 396 (1948); Underwood v. Dooley, *supra* note 3; Farmer's Ins. Exchange v. Arlt, *supra* note 3.

insurer to join as party plaintiffs in a single action in order to preserve their respective rights against the defendant.[14]

The court in the principal case, discussing the subrogation problem in dictum, recognized and approved the exception to the one-cause-of-action rule where subrogation claims are involved.[15] It should also be noted that paragraph six of the syllabus of the *Vasu* case (a paragraph which was not overruled by the principal case) states that where a subrogation claim is involved an insurance company may bring a separate action for indemnification.[16] The facts involved in the *Vasu* case were identical to those in the hypothetical question raised above. It is reasonable to infer that the court in the instant case, in failing to overrule any of the other syllabi in the *Vasu* case, is approving the disposition between the parties effected by the *Vasu* decision disagreeing only with the reasoning which led to that disposition. Although it seems likely that the court will adopt the subrogation exception when the proper issues are brought before it, until the question is definitely settled a danger exists that an action by an insurance company on a subrogated property damage claim might bar any subsequent suit by the insured for personal injuries arising out of the same accident.

Even if the court does recognize the exception to the one-cause-of-action rule where a subrogation claim is involved there is still a possibility under Revised Code section 2307.20[17] that a defendant can force the insured to join as a party in any suit brought by the insurer for indemnification. In the Ohio case of *Philadelphia National Insurance v. Scovanner*,[18] the court held that the defendant could join the insured as a necessary party under the joinder statute, in an action between the defendant and the insurer, on the basis that under a "$50 Deductible Policy" the insured would recover that portion of the loss he had stood under the insurance contract in the event that the insurer won the case. Under a similar interpretation of Revised Code section 2307.20 a person who had collected under a deductible policy (and most collision policies are of this deductible nature) could, in the event that his insurance company filed suit before he did, be forced to join in that suit as a party

[14] Glove & Rutgers Fire Ins. Co. v. Cleveland, 167 Tenn. 83, 34 S.W.2d 1059 (1931); Moultroup v. Gorham, *supra* note 3; Sprague v. Adams, *supra* note 3.

[15] Rush v. Maple Heights, *supra* note 1, at 233; 147 N.E.2d at 606.

[16] Paragraph 6 of the syllabus in Vasu v. Kohlers, *supra* note 2, holds that "where an injury to person and to property though a single wrongful act causes a prior contract of indemnity and subrogation as to the injury to the property, to come into operation for the benefit of the person injured, the indemnitor may prosecute a separate action against the party causing such injury for reimbursement of the indemnity monies paid under such contract."

[17] The statute states that "parties who are united in interest must be joined as plaintiffs or defendants."

[18] 86 Ohio App. 435, 92 N.E.2d 832 (1949); See also Duncan v. Willis, 51 Ohio St. 433, 38 N.E. 13 (1894); Verdier v. Marshalville Equity Co., 70 Ohio App. 434, 46 N.E.2d 636 (1940).

with the insurance company. If the insured was made a party to such a suit the issue of negligence would be res judicata in any future action with the defendant, the issue having already been decided in the prior case in which they were both parties.[19] Another important question is, could there in fact be another suit? That is, could the insured in an effort to escape the prejudices arising from being joined with an insurance company refrain from trying his personal injury claim in the property damage suit, or would his failure to plead all the elements of damage result in a splitting of his cause of action and thus bar any future suit he may attempt to bring? This question has not yet presented itself in any majority jurisdiction.

A possible answer to the above question might be found in the decision of a Kentucky court, wherein the exception to the one-cause-of-action rule operating under a statute similar to Revised Code section 2307.20[20] was held to prohibit an insured, who had already recovered a judgment for personal injuries in a separate action against the defendant, from being joined in the insurer's suit against the defendant, because such insured could not have instigated the action.[21] It seems clear that the Kentucky court views the exception as creating not two distinct causes of action, but rather one cause of action in the insured and one in the insurer, and that each must present his full claim in the first suit in which he is a party. Assuming the Ohio Supreme Court is as anxious in the future as it has been in the past to put an end to "vexatious litigation," it seems logical to conclude that they would require the joined insured to present his full claim at his first opportunity.

It may be possible to avoid the problem of joinder in the subrogated property damage claim if the insured in the subrogation agreement waives all contractual rights he may have had under the insurance contract to any portion of the judgment recovered by the insurance company against the defendant. In such case it would seem that there would be no basis for joinder of the insured under Revised Code section 2307.20.

Another question is presented by the actual disposition in the principal case. The instant court admitted that although the rule in the *Vasu* case had been distinguished in one case,[22] and explained in another,[23] it had remained unchanged until the overruling.[24] The two-cause-of-action rule embedded in the *Vasu* case had become a well known technical rule of pleading, and one which had been relied upon by the practicing bar for some time. The plaintiff in the principal case had no way of knowing that in choosing to bring separate actions she would lose her

[19] Mansker v. Dealers Transport Co., 160 Ohio St. 255, 116 N.E.2d 3 (1953). See Note, 15 OHIO ST. L.J. 382 (1954).

[20] Ky. RULES CIV. PROC., §19.01 (1953).

[21] Traveler's Indemnity Co. v. Moore, *supra* note 13.

[22] Markota v. East Ohio Gas Co., 154 Ohio St. 546, 97 N.E.2d 13 (1951)

[23] Mansker v. Dealers Transport Co., *supra* note 19.

[24] Rush v. Maple Heights, *supra* note 1, at 229, 147 N.E.2d at 602.

right to recover for personal injuries. The plaintiff had relied upon the decision in the *Vasu* case, and this reliance was certainly reasonable. In view of this reliance, the effect of the retroactive overruling in the principal case seems harsh. If the court in the principal case was so determined to abrogate the two-cause-of-action rule, it should have provided for the overruling to act prospectively only,[25] rather than subject the plaintiff in an *ex post facto* manner to the newly adopted rule.

Whether or not one agrees with the method or the reasoning of the court in the principal case, the fact remains that this case is now the rule in Ohio. The court, by overruling the *Vasu* case and adopting the majority view that a single tort gives rise to only one cause of action in the injured party regardless of the number of rights invaded, forces the practitioner to reevaluate his position in any future litigation involving both property damage and personal injuries.

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[25] "A majority, probably, of the state courts accept the traditional assumption of the common law that the business of a court is to determine just grounds of decision in the case before it and, by the same token, that any ground of decision of which the court approves ought to be applied in the case before it. In the last half-century, however, a contrary practice of engaging, on occasion, in what is called prospective overruling has made great headway, and assumed substantial importance." HART & SACKS, BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 660-61 (tentative ed. 1957). In Mutual Life Ins. Co. v. Bryant, 296 Ky. 815, 177 S.W.2d 588 (1943), the court overruled a previous decision "provided however, this opinion is not to be given retroactive effect so as to affect appellee's policy and other contracts made and entered into subsequent to the effective date of the opinion in the O'Brien case."

The constitutionality of prospective overruling was upheld in Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).